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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

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8
9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**
11

12 LUIS LERMA, an Individual and
13 NICK PEARSON, an Individual,
14 On Behalf of Themselves and All
15 Others Similarly Situated,

16 Plaintiffs,

17 v.

18 SCHIFF NUTRITION
19 INTERNATIONAL, INC., a
20 Delaware Corporation and
21 SCHIFF NUTRITION GROUP,
22 INC., a Utah Corporation,

23 Defendants.

CASE NO. 11cv1056-mdd

OBJECTION OF
CHARLES M. THOMPSON

24 **COMES** Charles M. Thompson, *pro se*, having appropriately filed his claim as a
25 class member in this case, and does file this his Objection to the subject Settlement and
26 allege in support thereof as follows:

27 **INTRODUCTION**

28 1. Roll of Objectors in Modern Day Class Settlements – Of course, it is the court's
determination to decide what is fair, adequate and reasonable in this case. The U.S. Supreme
Court has given trial courts narrow discretion in interpreting Rule 23, *Fed. R. Civ. P.* The bar
began to be raised in *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 102
Sup. Ct. 1264, 72 L. Ed. 2d 740 (1982) which held that a class action may only be approved once

1 the trial court is satisfied, after a *rigorous analysis*, that the prerequisites of Rule 23(a) have been
2 satisfied. *Id.* At 161. (Emphasis added).

3 2. And in order for the Trial Court to conduct a rigorous analysis, the United States
4 Supreme Court has made it clear that due process requires adequate representation of the interests
5 of absentee class members whom the Judge will bind. *Hansberry v. Lee*, 311 U.S. 32, 42-43, 61
6 S. Ct. 115, 118-19, 85 L. Ed. 22 (1940). This is textbook law. Not every lawyer who has a license
7 can provide “adequate representation.” Only a miniscule percentage of lawyers understands class
8 action proceedings.
9

10 3. To that end, only a handful of lawyers understand the actual overriding motives of
11 many attorneys who arrive at a class action settlement. During the last decade, legal scholars have
12 expressed growing concern about the conflicts that may arise between the class and its counsel:
13 “These attorneys are not subject to monitoring by their putative clients, they operate largely
14 according to their own self-interests, subject only to whatever constraints might be imposed by bar
15 discipline, judicial oversight, and their own sense of ethics and fiduciary responsibilities.”
16 Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and*
17 *Derivative Litigation*, 50 U.CHIL.L.REV. 1, 7-8 n. 4 (1991); see also John C. Coffee, Jr.,
18 *Rethinking the Class Action*, 62 IND.L.J. 625, 628-29 (1987) (listing several factors that have
19 contributed to “entrepreneurial” class action litigation, including the relatively low cost of filing
20 dubious class action suits, the large amounts that Defendants are willing to pay in settling these
21 suits and the incentive for class counsel to invest little time or effort in protecting the absent class
22 members); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness*
23 *and Efficiency in the Large Class Action*, 54 U.CHIL.L.REV. 877, 878, 878-79 (1987) (outlining
24 proposed rule changes that would “manipulate the incentives that the law holds out so as to
25 motivate” class counsel to represent the absent class members as they would any other client).
26
27
28

1 Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*,
2 4 J.LEGALSTUD. 47, 61 (1975) (coining the phrase "lawyer-entrepreneur" in reference to class
3 counsel).

4 Judge Posner has noted:

5
6 [T]he absence of a real client impairs the incentive of the lawyer
7 for the class to press the suit to a successful conclusion. His
8 earnings from the suit are determined by the legal fee he receives
9 rather than the size of the judgment. No one has an economic
10 stake in the size of the judgment except the defendant, who has an
11 interest in minimizing it. The lawyers for the class will be tempted
12 to offer to settle with defendant for a small judgment and a large
13 legal fee, and such an offer will be attractive to the defendant,
14 provided the sum of the two figures is less than the defendant's net
expected loss from going to trial. Although the judge must
approve the settlement, the lawyers largely control his access to the
information about the merits of the claim, the amount of work done
by the lawyer for the class, the likely damages if the case goes to
trial, etc. — that is vital to determining the reasonableness of the
settlement.

15 Richard A. Posner, *An Economic Analysis of Law*, at 570 (4th ed. 1992).

16 4. In simplest terms, the critical role of the Court, joined by objectors, with regard to
17 Rule 23 is to act as guardian for absent class members in assuring that the settlement is fair,
18 adequate and reasonable. If in fact the settlement is fair, adequate and reasonable in all aspects,
19 the Court, the Defendant and class counsel should welcome the presence of class members who
20 did not participate in the discovery and settlement procedure in their role of further assuring that
21 the settlement meets the criteria of Rule 23.

22
23 5. Typically, however, class counsel and the Defendant do everything possible to
24 minimize the role of any would-be objector. Class counsel and Defendant's counsel must be
25 aware that most individuals in a class settlement cannot afford and will not go to the effort to seek
26 legal counsel even if they are greatly dissatisfied with the proposed settlement. Through closed-
27 door manipulations, the settling attorneys might try sometimes essentially to control the settlement
28

1 hearing.

2 **A. THE PROOF REQUIREMENT TO MAKE A CLAIM IS**
3 **INHERENTLY UNFAIR AND UNREASONABLE**

4 6. The settlement provides for two separate settlement classes (i) those who save drug
5 store receipts and (ii) those who do not. Those few class members who save itemized receipts are
6 entitled to a larger payment, if they saved their receipts and/or their used bottles. This requirement
7 is inherently unfair to both classes. One California court noted the unreasonableness of this
8 requirement: “Consumers are not likely to retain records of small purchases for long periods of
9 time.” *State of California v. Levi Strauss & Co.*, 41 Cal.3d 460, 472 (1986).
10

11 **B. THE ATTORNEYS’ FEES APPEAR UNREASONABLE**

12 7. Attorneys’ fees must reflect the actual value recouped by the class members. *In re*
13 *Excess Value Ins. Coverage Litig.*, No. M-21-84RMB, MDL-1139, 2004 WL 1724980, at 13
14 (S.D.N.Y. July 30, 2004). When the process for awarding attorneys’ fees is non-adversarial,
15 courts must be particularly diligent in comparing the value of the settlement with the fee award.
16 *See, Weinberger v. Great N. Mekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991).
17

18 The settlement amount is woefully inadequate! Despite the class being notified that this
19 proposed settlement is \$6.51 million, there is actually only a \$2 million fund. (See pg. 4, ¶1, line
20 2, Order of Preliminary Approval of Class Settlement). Of the \$6.51 million, the putative
21 attorneys for the class are applying for attorneys’ fees of \$2,148,300. (See pg. 4, line 6, Plaintiffs’
22 Notice of Motion and Motion for Final Approval of Settlement, Attorneys’ Fees and Expenses
23 and Service Awards, “Motion for Final Approval”). Additionally, conditional class counsel is
24 asking the Court to award them an astronomical amount in expenses totaling \$1.5 million. (See
25 pg. 9, Section III, Plaintiffs’ Motion for Final Approval, ¶ E, lines 20-21). That means that
26 conditional class counsel expects the Court to award to them, out of the settlement fund, a total of
27 \$3,648,300. Thus, while most class members who file claims will get a grand total of \$3 per
28

1 bottle of Schiff products and \$10 per bottle if proof is extraordinarily furnished, conditional class
2 counsel desires the Court to award them \$3,648,300. Hence, conditional class counsel expects the
3 Court to approve a grand total of 56% of the total settlement amount in attorneys' fees and
4 expenses. This is a preposterous settlement! Obviously, based on the lengths that conditional
5 class counsel have gone to in order to show the Court how experienced and deserving they might
6 be, they have actually spent all of their multitude of hours getting a paltry class fund. One
7 supposes that Schiff out bargained conditional class attorneys.

9 Furthermore, conditional class counsel goes to great lengths in their fee application to
10 show the Court that there has been arm's length negotiations and no collusion in the subject
11 negotiations. Said counsel states that there is not a hint of a "clear sailing" agreement. The
12 record shows just the opposite. (See Section II, line 20, Order of Preliminary Approval of Class
13 Settlement). The "clear sailing" agreement in this proposed settlement lays the groundwork for
14 these lawyers to "urge a class settlement at a low figure or on a less-than-optimal basis in
15 exchange for red-carpet treatment on fees". *Weinberger v. Great Northern Nekoosa Court*, 925
16 F.2d 518, at 524 (1st Cir. 1991); Accord *In re: Bluetooth Headset Products Liability Litigation*
17 654 F.3d 935, at 948 (9th Cir. 2011).

19 C. SECRET FILINGS

20
21 8. Despite abundant law requiring openness for class members, class counsel has
22 seen fit to secrete an abundance of their filings in their Plaintiffs' Notice of Motion and Motion for
23 Final Approval of Settlement, Attorneys' Fees and Expenses and Service Awards. As an example,
24 much of said multi-faceted Motion has been redacted; plus, a number of exhibits attached to said
25 Motion have been placed under seal. How can class members expect to have full disclosure of the
26 settlement when conditional class counsel has not been forthcoming with their proposed
27 clients/class members? (See Exhibits 3, 4, 7 and 8 of Plaintiffs' Motion for Final Approval).
28

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2 **D. JOINDER IN OTHER OBJECTIONS**

3 9. This Objector adopts all other bona fide objections filed by other class members in
4 this case and incorporates them by reference as if they appeared in full herein.
5

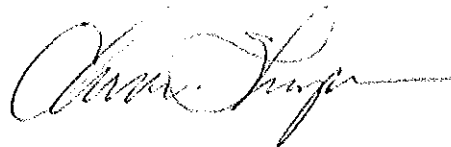
6 **E. CONCLUSION**

7 10. For the foregoing reasons and all others presented at oral arguments, this Objector
8 respectfully requests that the Court sustain his objection and grant the following relief:

9 A. Upon proper hearing, enter such Orders as are necessary and just to adjudicate this
10 Objection and to alleviate the inherent unfairness, inadequacies and unreasonableness
11 of the proposed settlement.
12

13 (Note: I am a member of the Settlement Class, and I purchased a Covered Product. This class
14 member, Charles M. Thompson, expects to appear at the settlement hearing in subject case and
15 present his objections to this proposed settlement. Mr. Thompson expects to take no more than 15
16 minutes in addressing same.)

17 Dated: September 24, 2015
18



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26
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3 **CERTIFICATE OF SERVICE**

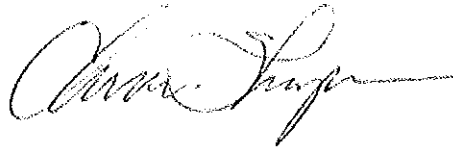
4 I hereby certify that on September 24, 2015, I mailed this document to:

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6 Southern District of California
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10 San Diego, California 92101

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Charles M. Thompson

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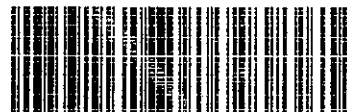
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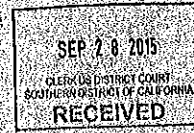
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